No. 22566

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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PLUMBERS & FITTERS, LOCAL 761,

*Appellant,*

*vs.*

MATT J. ZAICH CONSTRUCTION CO.,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### I.
### STATEMENT AS TO JURISDICTION.

The action below was brought by an employer, a building contractor, against a labor union for damages claimed to be due to the labor union's picketing. The United States District Court for the Central District of California had jurisdiction by reason of section 303 of the Labor Management Relations Act of 1947, as amended [29 U.S..C § 187], and 28 U.S.C. §§ 1331 and 1337. The case is before the United States Court of Appeals for the Ninth Circuit on appeal from a money judgment in favor of plaintiff employer in the District Court [R. A. 71].[1] Timely Notice of Appeal was filed by the defendant on December 5, 1967. The

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[1]"R. A." designates "Record on Appeal" and numerals indicate page references therein.

jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. §§ 41, 1291 and 1294.

## II.
## STATEMENT OF THE CASE.

Appellant Plumbers and Fitters Local 761 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein "Plumbers Union," is an unincorporated association and labor organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work [Finding of Fact 7, Findings of Fact and Conclusions of Law, R. A. 64].

Appellee Zaich Construction Co. is a California corporation and is a general engineering contractor duly licensed by the State of California [Finding of Fact 1, R. A. 64]. Appellee was one of two plaintiffs for whom judgment was rendered below. Appeal has been taken only from the judgment in favor of Appellee [R. A. 71].

Appellee is one of two corporations wholly owned by Matt J. Zaich which are used to carry on Mr. Zaich's contracting business [203/18-20 and 204/5-7].[2] Zaich Company, the other corporation, owns all the real property and assets of the business [238/17-239/5] and

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[2]Bracketed numerals refer to page and line numbers of the transcript of the trial in the District Court. Thus, "203/18-20" refers to the testimony at page 203, lines 18-20. A citation such as "200/19-201/5" refers to the testimony at page 200, line 19 through page 201, line 5.

was a member of the Associated General Contractors, herein "AGC," at the time of the dispute in question [276/23-277/5].

On or about July 27, 1962 Appellee was a member of the Underground Engineering Contractors Association, herein "UECA," an employer organization organized for the purpose of negotiating labor contracts on behalf of employer members with the collective bargaining representatives of their employees [Finding of Fact 9, R. A. 64-65].

At that time Appellee, as a member of the UECA, had a contract with the Laborers Union covering the work on the Calleguas Water Project [266/23-267/3]. Mr. Zaich, through Zaich Company's membership in the AGC, had another contract with the Laborers Union [264/6-13]. The primary difference between the two contracts was that the AGC contract provided for settlement of jurisdictional disputes by the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry, herein "NJB," while the UECA contract did not so provide [267/23-268/8].

Mr. Zaich, as the sole owner of both corporations, directed the business and labor relations of each corporation [225/16-20]. He bid on a particular job under the name of either corporation depending on the advice of his business manager [212/9-25]. The credit for Appellee's loans was based on the joint credit of the two companies and Zaich personally [243/5-244/4]. The two corporations shared the same offices and office staff [225/10-15]. Employees were interchanged between corporations [221/20-23], and Appellee used Zaich Company's equipment with only a yearly bookkeeping entry being made for such use [214/4-20].

The foregoing statement of facts is based upon the uncontradicted evidence produced by or through Appellee's witness, Matt J. Zaich. The following statement of the facts of the dispute and work stoppage is based on a stipulation of the parties at trial.

The Plumbers Union first attempted to secure an agreement from Mr. Zaich whereby its members would perform the work in question [11/20-24]. Failing in this attempt, and its subsequent attempt to secure the work through economic action [11/24-12/6], it invoked the procedures of the NJB and submitted the controversy for decision by that body [12/7-12].

Following notification to the Appellee and to the Laborers Union by the NJB that the controversy was before it for settlement and that it would hold a hearing on the dispute, through the UECA Appellee sent a wire to the NJB that it was not bound by any determination of that Board [12/13-22]. Likewise, the Laborers Union also refused to make any submission to the NJB as requested [12/23-24].

Thereupon the NJB made a determination of the dispute based upon the matters before it, and it awarded the work to the Plumbers Union. It so notified all parties on September 28, 1962. The picketing which was the subject of the suit below was that picketing by the Plumbers Union, commencing on November 29, 1962, which had as its object that which was stated on the picket signs: That the Appellee was "not conforming with decision of NJB" [12/2-10].

As a result of this picketing, a work stoppage occurred. The picketing was for the purpose of inducing compliance with the NJB award [13/11-14/3]. In December 1962, upon the petition of the Regional Director of the National Labor Relations Board, the picketing was enjoined by the District Court under section 10(l) of the Labor Management Relations Act [29 U.S.C. § 160(l)]. And on August 23, 1963, the National Labor Relations Board, in a 10(k) proceeding [29 U.S.C. § 160(k)], determined that the work was properly assigned to employees represented by the Laborers Union. 144 N.L.R.B. 133 (1963).

## III.
## QUESTIONS PRESENTED.

1. Can there be a violation of section 303 of the Labor Management Relations Act, as amended [29 U.S.C. § 187] based on section 8(b)(4)(D) of the Act [29 U.S.C. § 158(b)(4)(D)], where Appellant complied with and did not violate the NLRB's determination of the underlying dispute?

2. In light of the national labor policy, should Appellee be considered to be a single employer with Zaich Company and, therefore, be barred from recovering damages for its own violation of an arbitral award?

3. Is recovery of legal fees allegedly incurred by Appellee for (1) the filing of unfair labor practice charges, (2) the securing of an injunction to remove the picket line, and (3) participation in the 10(k) hearing proper under the facts and the law of the case?

## IV.
## SPECIFICATION OF ERRORS.

The judgment of the District Court in favor of Appellee should be reversed because the District Court has committed the following errors, each of which constitutes legal basis for such reversal. Based on uncontradicted evidence presented by the Appellee, the lower court erred in making the following findings of fact and conclusions of law as they are contrary to the undisputed facts and the national labor policy:

1. The finding contained in Finding of Fact 15 to the effect that Zaich was not a party to any agreement providing for arbitration of jurisdictional disputes by the NJB.

2. The finding contained in Finding of Fact 19 to the effect that Zaich Company was not the *alter ego* of Zaich Construction Company.

3. The finding contained in Finding of Fact 21 to the effect that because of the shutdown from November 30, 1962 to December 17, 1962, Appellee incurred legal fees for injunction matters in the sum of $4,317.21 or in any other sum.

4. The conclusion contained in Conclusion of Law 3 to the effect that Appellee was not bound by or subject to any ruling of the NJB affecting the assignment of work which had been made to the Laborers Union.

5. The conclusion contained in Conclusion of Law 5 to the effect that the picketing by the Plumbers Union was an unfair labor practice within the meaning of section 303 of the Labor Management Relations Act of 1947 and that the Plumbers Union violated section 303.

6. The conclusion contained in Conclusion of Law 7 to the effect that the attorney's fees were legally recoverable items of damage.

7. The conclusion contained in Conclusion of Law 8 to the effect that Appellee is entitled to judgment against the Plumbers Union in the sum of $19,443.96, or in any other sum.

## V.
## SUMMARY OF ARGUMENTS.

1. Section 303 provides for damages to any person injured by a labor organization's conduct if such conduct is an unfair labor practice within the meaning of section 8(b)(4) [29 U.S.C. § 158(b)(4)] of the Act. However, before a union's conduct can be found to violate the jurisdictional dispute provision of section 8(b)(4)(D) (the section involved in this case), the NLRB must hold a hearing pursuant to section 10(k) [29 U.S.C. § 160(k)] and make a determination of the dispute. *Only if the losing union violates that determination will there be found a violation of section 8(b)(4)(D).* Because there was no violation in this case of the NLRB's determination, there can be found no violation of section 8(b)(4)(D), and consequently no violation of section 303.

It was not, however, always so. Prior to 1959, section 303(a) contained its own definition of conduct which was unlawful and redressible through a damage action. In 1959, Congress amended section 303(a) to read, in relevant part, as follows:

> "It shall be unlawful . . . for any labor organization to engage in any activity or conduct *defined as an unfair labor practice in section 8(b)(4) . . .*" (emphasis added).

Thus, at least since 1959 a violation of section 303 could be shown only by showing a violation of section 8(b)(4). And since there was here no violation of section 8(b)(4), neither is there a violation of section 303.

2. Appellee was one of two corporations wholly owned and dominated by Matt J. Zaich and used by him to carry on his single business enterprise of underground contracting. Mr. Zaich, through his Zaich Company, was a member of the AGC, which membership bound him to the NJB. Both the Plumbers Union and the Laborers Union were bound to the NJB as well.

Because of the inter-relationship of Matt Zaich's corporate entities, the two corporations, for the purposes of national labor policy should be considered as one employer; and as a single employer carrying on a unitary business enterprise, Appellee was bound to the arbitral determination of the NJB.

A union may use economic action to secure compliance with arbitration awards, including the awards of the NJB. Since the picketing was for this purpose, it did not violate section 303 of the Act.

3. Appellee's recovery of legal fees for the filing of unfair labor practice charges is unsupported by the evidence. It was affirmatively shown that Appellee's attorneys did not perform at least part of the tasks for which it claims legal fees and such fees are not, therefore, recoverable.

Recovery of legal fees for securing an injunction is unsupported by the evidence. The injunction was secured by the government, not by Appellee.

There is no basis in law for recovery of legal fees incurred as a result of participation in a 10(k) proceeding.

Appellee's recovery of legal fees is improper for the additional reason that such items of expense, if incurred at all, were capable of certain proof and were not so proved; rather, Appellee merely claimed a lump sum for all legal fees. Since one or more of the items was improper, the Court could not have ascertained what part of the total fee was allocable to the item or items for which recovery was contrary to law. Therefore, the Court should disallow Appellee's recovery for legal fees in any sum.

## VI.
## ARGUMENTS.

### A. AS A MATTER OF LAW, THERE WAS NO UNFAIR LABOR PRACTICE WITHIN THE MEANING OF SECTION 8(b)(4)(D); THEREFORE, NO VIOLATION OF SECTION 303 OCCURRED.

#### 1. The Historical Background of Legislation Concerning Jurisdictional Strikes.

In order to properly place into perspective the problems of jurisdictional disputes, some brief review of the interrelation of the various federal labor laws is essential.

Prior to 1932 the federal judiciary was deeply embroiled in the business of issuing and enforcing injunctions in labor disputes. See Frankfurter & Greene, *The Labor Injunction* (1930). To counter this Congress enacted the Norris-La Guardia Act, 47 Stat. 70 (1932) [29 U.S.C. §§ 101-15], which, in essence, states that "no court of the United States . . . shall have jurisdiction to issue any restraining order or . . . injunction in a case involving or growing out of a labor dispute . . ." 29 U.S.C. § 104.

In 1935 the Wagner (National Labor Relations) Act was passed, 49 Stat. 449 (1935) [29 U.S.C. §§ 151-66], proscribing, in section 8 [29 U.S.C. § 158], five types of employer conduct which were denominated as unfair labor practices. Not only was there no union-proscribed conduct in the Wagner Act, but in setion 7 [29 U.S.C. § 157] employees were affirmatively given the right to engage in concerted (strike) activity, and any peaceful conduct was condoned, regardless of the economic injury imposed. This was in sharp distinction to pre-Norris-La Guardia and Wagner

Act days when the presumption appeared to be that strikes and their attendant injuries were unlawful.

As a result of the almost absolute ban on restraints on picketing, on an occasion when a jurisdictional dispute erupted between the Carpenters Union and the Machinists, in an attempt to terminate the ensuing strike the anti-trust laws were invoked and a criminal indictment was brought against the officers of the picketing union. The Supreme Court was presented with the problem of resolving an apparent conflict between the Norris-La Guardia Act, which permitted economic injury, and the Sherman Act, which prohibited it. The Court resolved the conflict between these two laws by holding that no violation of the Sherman Act could be sustained where the union engaged in conduct which was immune under the Norris-La Guardia Act from injunctive relief. The wide range of laws relating to labor, said the Court, must be read together; and that which is permitted under one law may not be interdicted under another. *United States v. Hutcheson,* 312 U.S. 219, 234-36 (1941); *cf. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 689 (1965) ("exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws").

This policy prevailed until 1947, when Congress examined the lack of restraints on labor unions and passed the Taft-Hartley (Labor Management Relations) Act, 61 Stat. 136 (1947) [29 U.S.C. § 141], which counterbalanced the five employer unfair labor practices with six union unfair labor practices (see 29 U.S.C. §§ 158[b][1] through [6]). Two additional

union unfair labor practices were added by the enactment in 1959 of the Landrum-Griffin (Labor-Management Reporting and Disclosure) Act, 73 Stat. 519 (1959) (see §§ 8[b][7] and 8[e] [29 U.S.C. §§ 158-(b)(7) and 158(e)]).

Even in 1947, however, when Congress was legislating against unions, it nonetheless carefully provided a remedy in damages for only one of the six newly-created union unfair labor practices. Only for a section 8(b)(4)-type violation did damages flow. See section 303(a) of Taft-Hartley Act. For the other five unfair labor practices there was no redress, other than that provided by the National Labor Relations Board. Indeed, at the same time it was thus restricting unions, Congress specifically provided in section 13 [29 U.S.C. § 163] that "nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ."; and in a proviso to section 8(b)(4) employees were told that nothing in the Act made it unlawful for them to honor a picket line.

This concept was reinforced by judicial decisions which held that,

> "the detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor-Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. *Otherwise, it is implicit in the Act that the public interest is served by freedom of*

*labor to use the weapon of picketing." Garner v. Teamsters,* 346 U.S. 485, 499-500 (1953) (emphasis added).

In other decisions, the Supreme Court ruled that where a union's activities are *arguably* either protected or prohibited by the Act, the power of courts to award monetary or equitable relief for redress as a result of damages incurred because of concerted activities is displaced by the exclusive jurisdiction of the National Labor Relations Board. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959). And even when the Board attempted to regulate the *manner* in which lawful picketing could be conducted, the Board was rebuked by the Court for going outside the Congressional mandate. See *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 498 (1960).

In 1959, when Congress added still two more union unfair labor practices, it took pains not to add additional remedies in the form of damages. (This is especially interesting in light of the fact that one of the additional unfair labor practices—a prohibition on organizational and recognitional picketing [§ 8(b)(7) (29 U.S.C. § 158[b][7])]—was considered by some as a particularly egregious type of activity. For example, President Eisenhower, in his request for Congressional action in this field, specifically singled out such picketing as wrongful. See Comment, 9 U.C.L.A. L. Rev. 666 n.3 and preceding text (1962).

The sum, then, of this historical review is to demonstrate with what precision Congress has legislated when it desired to infringe upon the right to engage in concerted activities. At least since 1932, it has been the

norm for employees to be permitted to strike and picket regardless of the economic impact.[3] And even where such conduct is condemned, it is only in the *unusual* case where damages are recoverable.

## 2. The Interrelationship Between Section 8(b)(4)(D) and Section 303.

a. *Under the Taft-Hartley Act*—One of the Union unfair labor practices of the 1947 Taft-Hartley Act was contained in section 8(b)(4)(D) [29 U.S.C. § 158(b)(4)(D)], and it related to picketing by unions for the purpose of forcing or requiring an employer to change an assignment of work (commonly referred to as a jurisdictional strike). Also enacted at this time was section 10(k) [29 U.S.C. § 160(k)], which requires the National Labor Relations Board, upon the filing of a charge by any person alleging a violation of section 8(b)(4)(D), to hear and determine the dispute which gave rise to the unfair labor practice charge, unless the parties have themselves agreed upon a method of settlement. Assuming that the Board will determine the dispute, section 10(k) continues:

> "Upon compliance by the parties to the dispute with the decision [under 10(k)] of the Board . . . *such charge shall be dismissed.*" (Emphasis added).

Prior to the 1959 amendments to the Taft-Hartley Act, section 303(a) (under which the present suit is

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[3]In California, for example, the infliction of economic injury in the course of a labor dispute, so long as a trade union purpose is being served, is privileged. See Petri Cleaners, Inc. v. Automotive Employees, 53 Cal.2d 455, 469 (1960) (California's policy favors "free interaction of economic forces"); Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35 (1941). An attempt to outlaw the secondary boycott and "hot cargo" was held unconstitutional. In re Blancy 30 Cal.2d 643, 650-53 (1947).

brought) made it unlawful for a labor organization to engage in certain enumerated conduct, and subsection (b) gave a private cause of action to "whoever shall be injured . . . by reason of any violation of subsection (a)."

For the purposes of this argument, the important point with respect to section 303(a) prior to its amendment in 1959, is that it specifically set forth each type conduct for which damages were recoverable, albeit the enumeration was in substantially identical language to that contained in section 8(b)(4) of the Act. The difference, according to an early Supreme Court case, was that "section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4), to a judgment for damages." *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243-44 (1952).

In *Juneau Spruce,* the union had argued that section 303(a)(4) should be read in light of section 8(b)(4)-(D), which makes unlawful only such picketing as takes place *following* a determination by the Board that there were unfair labor practices committed (see last sentence of section 10[k], which requires a dismissal of unfair labor practice charges if there is compliance with the Board's determination). "If that conclusion is warranted," said the Court, "there must be a reversal here since the damages . . . accrued prior to the decision of the Board, under § 10(k) of the Act, that petitioners had committed an unfair labor practice within the meaning of § 8(b)(4)(D)." *Juneau Spruce,* 342 U.S. at 234. The Court, however, refused to accept this argument, primarily because

> "there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior ad-

ministrative determination that an unfair labor practice has been committed." *Juneau Spruce,* 342 U.S. at 244.

b. *The Landrum-Griffin amendments of 1959*— The above quoted language from *Juneau Spruce* points up the essence of the argument: by reason of the 1959 amendments, to paraphrase the foregoing quotation from *Juneau Spruce,* there now is language in section 303 which makes its remedy dependent upon a prior administrative determination. That language is as follows: "It shall be unlawful . . . for any labor organization to engage in any activity or conduct *defined as an unfair labor practice* in section 8(b)(4). . . ." (Emphasis added).

In other words, in 1959 Congress deleted the enumeration of unlawful conduct which had been contained in section 303(a), and opted for an incorporation by reference of section 8(b)(4). This being so, the statutory scheme of section 8(b)(4)(D) and section 10(k) must have been intended to go along with that incorporation by reference and is, therefore, applicable to the present case.

Thus, the entire statutory scheme which comes into play when there is a charged violation of section 8(b)-(4)(D) is this: Under section 10(l) [29 U.S.C. § 160(l)], in situations where it is appropriate an immediate investigation is conducted by the Board, which takes priority over all other cases in the office where the charge has been filed. If after the investigation the officer or regional attorney of the Board to whom the matter was referred has reasonable cause to believe that the charge is true, "he *shall*" petition the appropri-

ate United States District Court for injunctive relief.[4] The Board is then directed to hear and determine the dispute out of which the charge arose. Again, as with the Congressional mandate to seek an injunction, the holding of a hearing and determination of the dispute is mandatory. *Radio & Television Broadcast Eng'rs v. NLRB,* 364 U.S. 573, 577 (1961).

It is a complete defense to an unfair labor practice charge under section 8(b)(4)(D) that the work which the picketing union sought to have assigned to it is determined by the Board properly to have been within the ambit of that union's jurisdiction, since at that stage, in the words of section 8(b)(4)(D), the employer would be "failing to conform to an order . . . of the Board determining the bargaining representative for employees performing such work," and under the "unless" clause of 8(b)(4)(D), there would be no violation of the Act.

Finally, a complaint will *only* issue "if the union which is the loser in a Sec. 10(k) proceeding fails to comply with the determination of the Board." *Dooley v. Highway Truckdrivers,* 182 F. Supp. 297, 304 n.9 (D. Del. 1960). There can, therefore, be no unfair labor practice unless there is first, a 10(k) hearing, and second, *non-compliance with the Board's determination.* See *Bechtel Corp.,* 112 N.L.R.B. 812,

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[4] *Cf.* Retail Clerks Union v. Food Employer Council, Inc., 351 F.2d 525, 528 (9th Cir. 1965): "Section 10(l) is mandatory, not discretionary in nature and requires the Regional Director to seek injunctive relief. . . ." Such an injunction is sought under section 8(b)(4)(D) even before a determination has been made that a violation in fact exists. See Dooley v. Highway Truckdrivers, 182 F. Supp. 297, 303-04 (D. Del. 1960).

813-15 (1955); *Los Angeles Bldg. Trades Council,* 88 N.L.R.B. 1101 (1950).[5]

During the period that the dispute is being determined, the union which had been picketing may be under injunction. The work may continue to be performed in accordance with the employer's assignment, and in many instances the work is completed by the time the 10(k) hearing has been concluded. Therefore, even if the picketing union is determined to be entitled to work, it is small solace to it and to its members.

Nevertheless, the statutory scheme has been so devised, and it has been passed upon by the Supreme Court. "It is more important to industrial peace," said the Court, "that jurisdictional disputes be settled permanently *than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." NLRB v. Radio & Television Broadcast Eng'rs Union,* 364 U.S. 573, 577 (1961) (emphasis added).

Thus, since the 1959 amendment to section 303 incorporated the statutory scheme of section 8(b)(4)(D), both the burdens and the benefits of that scheme must be borne by Appellee. Had the Plumbers' claim to the disputed work been determined by the Board to be valid, Appellee would nonetheless have secured the benefit of having had the work performed according to its original assignment because of the protection against picketing afforded it by the injunction issued under section 10(l). By the time the Board acted, the work would have been complete. To tell the Plumbers Union at that time that the Board was wrong in securing the

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[5]In *Public Constructors, Inc. v. Local 400 IBEW,* 65 L.R.R.M. 2291 (D.C. N.J. 1967), the Court rejected this construction of section 303.

injunction is, of course, meaningless; however, it is in accordance with the statutory plan with which the parties must comply.

To permit any other interpretation of section 303 would be to write out of the Act the defenses that are permitted by section 8(b)(4)(D), among which is the defense that the picketing union has agreed to comply with the Board's determination.[6]

## B. AS ZAICH CONSTRUCTION CO. AND ZAICH CO. CONSTITUTE A SINGLE EMPLOYER, ZAICH CONSTRUCTION CO. IS BOUND BY THE JURISDICTIONAL DETERMINATION OF THE NATIONAL JOINT BOARD AND, THEREFORE, NO UNFAIR LABOR PRACTICE WAS COMMITTED.

### 1. The National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry.

Shortly following the passage of the Taft-Hartley Act, employers and labor organizations in the building and construction industry created the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry. See *Armco Drainage & Metal Prods. Inc.,* 137 N.L.R.B. 1753, 1756 (1962). The creation of the NJB was at the urging of Congress, as demonstrated by section 10(k) [29 U.S.C. § 160(k)] of the Act. Section 10(k) directs the National Labor Relations Board to "hear and determine" jurisdictional disputes unless the parties have "agreed upon methods for the voluntary adjustment" of the dispute. The con-

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[6]In the present case the Plumbers Union complied with the 10(k) determination; the 10(l) injunction was, therefore, vacated and no complaint in fact issued against it.

tention of the Plumbers Union is that Zaich was bound, in 1962, by the procedures of the NJB; and that accordingly, picketing to compel compliance with the NJB's award was primary conduct the object of which was to compel compliance with an arbitration award. This object is a legitimate one, and does not violate the Act. See *Syracuse Supply Co.,* 139 N.L.R.B. 778, 780-81 (1962); *Pacific Maritime Ass'n,* 137 N.L.R.B. 119, 126 (1962).

**2. The National Joint Board Resolved the Jurisdictional Dispute in Question in Favor of the Plumbers Union.**

In the Spring of 1962 Appellant attempted and failed to secure a contract with Mr. Zaich. Because members of the Laborers Union were doing work which the Plumbers Union claimed to be within its jurisdiction, the Plumbers submitted the dispute to the NJB which in turn notified all parties that it would hold a hearing on the matter. The UECA notified the NJB on behalf of Zaich Construction Co. that the latter was not bound by the determination of the NJB. Significantly, however, no such notification was given to the Plumbers Union. And, of course, the Laborers Union gave no such notification because in fact it was a party to the NJB. The NJB proceeded to determine the case, awarded the work to the Plumbers Union and notified the parties of its decision. As there was no compliance with the decision of the NJB, the Plumbers Union picketed the non-complying company for the limited purpose of inducing compliance with the NJB's decision [11/20-14/3].

Picketing by the Plumbers Union was conducted on the assumption stated in its picket signs: that Zaich

was not abiding by a binding decision of the NJB. Since one of the conditions precedent to a decision by the NJB is that the employer be a member of a signatory employer association, it is obvious that both the Plumbers Union and the NJB considered that Zaich was such a member when the dispute was submitted to the NJB and the latter decided it.

### 3. Zaich Construction Co., as a Single Employer With Matt J. Zaich Co., Should Be Held to the Contractual Commitment of Matt J. Zaich Co. to Be Bound by the Determination of the National Joint Board That the Plumbers Union Had Jurisdiction of the Disputed Work.

#### a. Matt J. Zaich Co. Is Bound to the National Joint Board.

Matt J. Zaich Co. was a member of the Associated General Contractors at the time of the jurisdictional dispute in question [192/5-11]. The company had AGC labor agreements with the two principal unions with which Matt J. Zaich dealt, the Operating Engineers and the Laborers. These agreements bound Matt J. Zaich Co., as well as the unions signatory to those agreements, to the determinations of the NJB [262/8-18; 264/6-13; Defendant's Exs. G and N].

In May 1962, just before the commencement of the Calleguas Water Project, Zaich Construction Co. entered into a UECA contract with the Laborers [Plaintiff's Ex. 8]. Thus, Mr. Zaich had two contracts with the Laborers—one through Zaich Co. as a member of the AGC and one through Zaich Construction Co. as a member of the UECA.

In this way, Zaich could change the contractual coverage of Laborers employed by him by the manner in

which he bid the job, *i.e.*, depending on which corporate entity bid for a particular job [268/18-25].

There were only two differences between the AGC and UECA agreements. The one difference material to this case was that the UECA agreement did not contain the provisions for settlement of jurisdictional disputes by the NJB which the AGC agreement did have [267/23-268/8].

**b. For Purposes of Federal Labor Policy, Matt J. Zaich Co. and Appellee Zaich Construction Co. Constitute a Single Employer.**

Because of the federal labor policy, Zaich Construction Co. should be held to the commitment of Matt J. Zaich (made in Zaich Co.'s contracts) to submit jurisdictional disputes to the NJB. The national labor policy requires not only that employers and unions be held to contractual and legal obligations into which they voluntarily entered, regardless of the means they select to avoid these obligations, but this policy also obligates parties to abide by arrangements not necessarily of their own choosing where so obligating them fulfills a higher national objective. See, *e.g.*, *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (requiring noncontracting employer to arbitrate whether or not it was bound by collective bargaining agreement of company that had merged with it).

In this case, the higher objective is the peaceful settlement of jurisdictional disputes. This policy is set forth in section 10(k); in the preamble to the Act (which states in section 1(b) [29 U.S.C. §151(b)] that its objective is to promote and encourage "the practice and procedure of collective bargaining"); and in other parts of the Act as well:

> "[I]t is the policy of the United States that . . . sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining." [29 U.S.C. § 171(a)].

"Congress was . . . interested," said the Supreme Court, speaking of the enactment of the Taft-Hartley Act, "in promoting collective bargaining," *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 453 (1957), and the Legislature recognized that "industrial peace can be best obtained" by judicial recognition and enforcement of agreements between unions and employers. *Id.*, 353 U.S. at 455.

The determination of questions under the Act "requires a consideration of the legislative object sought to be attained." *LeBaron v. Los Angeles Bldg. Trades Council,* 84 F. Supp. 629, 632 (S.D. Cal. 1949). This legislative object is clearly to promote voluntary adjustments of disputes. And what better way to vitiate this policy than to hold that once voluntary adjustments are entered into, they may be circumvented through the use of different corporate entities to carry on a single business enterprise.

In the light, then, of this national policy, the conclusion is compelled that Zaich may not escape its commitment to the NJB. For purposes of binding Zaich to the NJB's determination the following factors dictate that Zaich's corporate entities be treated as one:

i. Interrelation of operations.

ii. Common management and ownership.

iii. Centralized control of labor relations.

See 21 NLRB Ann. Rep. 14-15 (1956) and cases discussed below.

Matt Zaich's contracting business is carried on through two corporations and as an individual. He has contractor's licenses in his individual name and in two corporate names—Zaich Co. and Zaich Construction Co., the appellee herein [204/17-24].

Zaich's testimony shows that he would bid on a given job under any one of his three licenses, depending only on advice from his business manager [212/9-19]. And he stated that he used two corporations for tax purposes [222/19-21]. From this testimony it can be seen that Zaich's contracting business was in fact a single unitary enterprise. The use of two corporations is for the not uncommon purpose of minimizing his tax liabilities by manipulating the contracts undertaken by each corporation so as to divide his profits between several entities. The fact that the corporations are nominally separate for tax purposes has no bearing on whether the business enterprise engaged in by Zaich is such that it should be considered a single business in relation to federal labor policy. See *NLRB v. City Yellow Cab Co.,* 344 F.2d 575, 578 (6th Cir. 1965) (two separately taxed and competing corporations considered as one employer for jurisdictional purposes of NLRB).

The NLRB and the courts have had occasion to deal with the question of two or more corporations as a single employer, and in so doing have fashioned a federal labor policy which should govern in this case.

In *Schnell Tool & Die Corp.,* 144 N.L.R.B. 385 (1963), *enf'd,* 359 F.2d 39 (6th Cir. 1966), the Board held two corporations to be a single enterprise and a

single employer for purposes of giving remedial relief for unfair labor practices. The facts in *Schnell* were:

1. Both corporations were controlled by the same family with the same officers, directors and owners (In this case, Matt J. Zaich is the sole owner, and is an officer and director of both corporations).

2. The two corporations were engaged in similar but different work (The two corporations in this case are engaged in the same work).

3. There was a partial identity of location of plant premises (In this case, both corporations operate from the same premises).

4. The employees of the two concerns were interchanged as were tools and equipment (In this case, both employees and equipment were interchanged, though a bookkeeping charge was made by one corporation to the other for major equipment but not for hand tools).

5. The two companies were served by the same office and telephones (The same is true here).

6. One man ran both corporations, and directed the labor policy of each (The labor policies of both corporations in this case were directed by Matt J. Zaich).

The Board held that though the two entities in *Schnell* were separate corporations legally, they were a single employer for purposes of the Act since they were subject to the same ownership and control, engaged in related operations, and pursued the same labor policies. 144 N.L.R.B. at 388.

In *Pizza Products Corporation v. NLRB*, 369 F.2d 431 (6th Cir. 1966), *enf'g*, 153 N.L.R.B. 1265 (1965), the court affirmed a finding by the Board that two corporate entities were a single employer. In that case

the two corporations were run by one man and they shared the same premises, one renting space from the other. The employees of one were loaned to another, but each had separate books and payrolls which were maintained by a common bookkeeper. All of these factors are present in the case at bar.

In *A. M. Andrews Co.,* 112 N.L.R.B. 626 (1955), *enf'd,* 236 F.2d 44 (9th Cir. 1956), the Board found that Illinois and Oregon corporations constituted a single employer for the purposes of finding one responsible for the acts of the other. In this case, the 95% shareholder of the Oregon corporation formed an Illinois corporation for the purpose of carrying on his business in Illinois. When threatened with unionization, the Illinois business was dissolved. The key factors to support a finding of single employership were:

1. The corporations were engaged in the same business (True of this case).

2. Owners and officers are nearly the same (The same is true here).

3. The Oregon corporation lent its credit to the Illinois corporation (In this case, bids and loans were made on the basis of the joint credit of the two corporations and the personal credit of Matt J. Zaich and his wife).

4. There was a transfer of the assets of the Illinois corporation to Oregon after the Illinois operation was closed (In this case, there was no closing out of one of the corporations, so that this condition is not present).

5. The labor relations of both corporations were controlled by one man (Matt J. Zaich controls both corporations here). 112 N.L.R.B. at 629.

Therefore, the Board held that the Illinois and Oregon corporations were a single employer and that the Oregon corporation was responsible for remedying the unfair labor practices committed in Illinois.

Zaich's operations in this case fall well within the scope of being a single employer for purposes of federal labor policy. Each of the factors involved in the above cases is present in Zaich's case.

To recapitulate these facts:

i. Zaich Co. and Zaich Construction Co. were owned and completely dominated by one man—Matt J. Zaich.

ii. The two corporations shared the same premises.

iii. Zaich Construction Co. owned no assets other than its accounts receivable—it was a shell corporation used for the purpose of receiving funds from particular jobs in order to reduce tax liability.

iv. The same employee handled the books of each corporation.

v. Zaich Co. owns all equipment and hand tools used by Zaich Construction Co.; no accounting for the use of the hand tools is made, and for the heavy equipment rentals are based on year-end accounting entries which can be manipulated to achieve desired tax consequences.

vi. Financing of Zaich Construction's projects is based on the credit of Zaich Company and Mr. and Mrs. Zaich. Mr. and Mrs. Zaich personally guarantee loans secured by Zaich Construction Co.

vii. Zaich's operations were integrated—even to the extent that he could bid on a given job through either corporation—subject only to the advice of his business manager (tax adviser).

viii. Most importantly, Zaich ran both corporations' operations, including their labor relations. He could direct employees and equipment from one job and corporation to another. If two jobs were going simultaneously, he would manage both—and to the workers who might even work on both jobs, it would matter not at all in their relations on the job with Zaich that the job was bid in the name of one corporation or the other.

This is especially important in terms of the policies which supported a finding of single employership in *Schnell, Andrews* and *Pizza*. To the union and to the workers, corporate intricacies designed as sophisticated tax gimmicks mean little. They see one man, Matt Zaich, running the whole show. Mr. Zaich does not wear a "Zaich Co." hat one day and a "Zaich Construction Co." hat the next, at least not one that is visible to the men on his jobs.

In this case there is (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. These factors go to show operational integration which the Board uses as a guide to a finding of single employership. See 21 NLRB Ann. Rep. 14-15 (1956).

While on paper the corporate separateness of Zaich's operations may be clear, it is submitted that economic realities which have influenced the fashioning of a federal labor policy require a finding that Zaich Co. and Zaich Construction Co. are a single employer for the purpose of determining whether Zaich Construction Co. is bound by the jurisdictional determination of the NJB.

Not only is it fair to hold Matt J. Zaich to his contractual obligation to abide by the NJB's determination which he made through one of his corporate instrumentalities, but, more importantly, it would be manifestly unjust to hold that the Plumbers Union, on pain of paying a large money judgment, should have known that Mr. Zaich had a complex corporate setup for the management of his contracting business. Mr. Zaich should not be able so easily to escape his contractual responsibilities by reliance on technicalities and paper differences between his corporate entities.

There was no dispute in the evidence as to the way Zaich handled his business. The testimony was uncontradicted and it all came from Mr. Zaich himself. There are, therefore, no questions of credibility to be resolved. Whether appellee should be held to be bound to the NJB is a question of law—based upon the national labor policy—which this Court should determine independently of the trial court. See, *e.g., Kwikset Locks, Inc. v. Hillgren*, 210 F.2d 483, 488-89 (9th Cir. 1953), *cert. den.* 347 U.S. 989 (1954); *Stevenot v. Norberg*, 210 F.2d 615, 619 (9th Cir. 1954).

While Finding of Fact No. 19 [R. A. 6] states that Zaich Company was not the *alter ego* of Zaich Construction Co., this is more properly a conclusion of law as the underlying facts on which such conclusion was based were uncontradicted. The same is true of Finding of Fact No. 15, which states that appellee was not a party to any agreement providing for arbitration of jurisdictional disputes by the NJB.

**c. As Zaich Construction Co. Was Bound by the NJB Determination, the Picketing by the Plumbers Union, Was Not an Unfair Labor Practice.**

The NLRB favors the voluntary adjustment of jurisdictional disputes, even to the extent that where such procedures are available and are binding on all the parties, the NLRB will decline to hear the case. See, *e.g., Ebasco Services Inc.,* 153 N.L.R.B. 873 (1965). Indeed, in *Ebasco,* though the losing union picketed after an NJB award in favor of another union, the NLRB dismissed the complaint against the picketing union and left the parties to the courts or other means to attempt to resolve the question of how to give effect to the award. This was because the picketing was at best a breach of contract but not a violation of the Act.

Where the primary purpose of picketing is to enforce a lawful obligation of the employer, the conduct does not violate the Act. *Syracuse Supply Co.,* 139 N.L.R.B. 778, 780-81 (1962); see *Sheet Metal Workers Union v. Aetna Corp.,* 359 F.2d 1, 5 (1st Cir. 1966) ("if such [great] force is to be given to collective bargaining agreements between management and unions, no less support should be given agreements to which unions resort to resolve their jurisdictional disputes").

Otherwise stated, once a union has attained its objectives in a valid and binding agreement or award, it has a right to use economic action to require that its provisions be complied with. An obligation that an employer has incurred to assign work to members of one union rather than to members of another, may be enforceable, upon default by the employer, through eco-

nomic action by the injured union. *Pacific Maritime Ass'n,* 137 N.L.R.B. 119, 126 (1962). The NJB award in the instant case is such a binding award which the Plumbers Union had a right to enforce by picketing.

### C. THE COURT ERRED IN AWARDING AS AN ITEM OF DAMAGES LEGAL FEES CLAIMED TO HAVE BEEN EXPENDED TO SECURE THE FILING OF THE UNFAIR LABOR PRACTICE CHARGE, TO SECURE AN INJUNCTION TO REMOVE THE PICKET LINE, AND FOR PARTICIPATION IN THE 10(k) HEARING.

#### 1. Legal Fees for Filing an Unfair Labor Practice Charge Are Not Recoverable as Damages.

By taking judicial notice of the file in *Kennedy v. Plumbers,* United States District Court, Southern District of California, Central Division, Case No. 62-1623-CC, the Court will see that the unfair labor practice charges which are attached to the Petition for Injunction were filed not by an attorney but by Robert F. Wilken, who is associated with public relations for the UECA [334/19-24].

It is evident, therefore, that it was the Appellee's association which filed the charge on its behalf; consequently, whether or not attorney's fees were charged for this, they are not recoverable for not only is there a lack of proof of any services performed, but there is affirmative evidence of these services having been performed by others.

#### 2. Legal Fees for Enjoining the Picketing Are Not Recoverable as Damages.

Likewise, there is no evidence of any work performed by attorneys hired by the Appellee in securing an injunction to enjoin the picketing. The only attorneys

whose names appear on the pleadings and points and authorities are those of the attorneys for the NLRB.

The Petition for Injunction was filed by the government lawyers on behalf of Ralph E. Kennedy, Regional Director of the Twenty-First Region of the Board. Nowhere in the file is there any evidence of the initiation, continuation, or necessary participation in proceedings by any attorney for the Appellee.

The Appellee's attorneys did not "secure" an injunction. The government did!

### 3. Legal Fees for Participation in a 10(k) Hearing Are Not Recoverable as Damages.

There were three bases upon which the Appellee purports to support its claim against the Plumbers Union for legal fees incurred. The first two have been discussed, and the third revolves around the attorneys' handling of the 10(k) proceeding.

The Appellee could not present below—and it cannot present here—any authority for the proposition that fees involved in the handling of a section 10(k) hearing are recoverable. Recovery of any fees for such participation should have been disallowed.

### 4. Proof of Each Item of Legal Fees Was Vague and Uncertain and, Therefore, Any Recovery of Legal Fees Should Be Disallowed.

The Appellee simply offered evidence of the amount that it expended in attorneys' fees [Plaintiff's Ex. 1, Scheds 2, 8]. No attempt was made to relate the fees to the services performed. Some of the fees, for example, may have been charged for advice rendered subsequent to the 10(k) hearing. Those fees, along with

the fees for participation in that hearing are clearly not recoverable. Since the Appellee did not establish with certainty for what services the fees were paid, they lack certainty and should be denied.

It is often stated that where it is certain that there was injury, it is not necessary that the extent of injury be certain. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1932). Notwithstanding the liberality of this rule on proof of damages, where damages are capable of definite and certain calculation, they "must be proved by facts from which their existence is logically and legally inferrable, and cannot be supplied by conjecture." *Christiansen v. Mechanical Contractors Bid Depository,* 230 F. Supp. 186, 194 (D.C. Utah, 1964).

If any legal fees are recoverable, it was certainly within Appellee's power to prove these with great certainty. There was no breakdown of the total amount claimed for legal fees as to the particular items of service allegedly rendered by counsel for Appellee. Since one or more of the attorney's services was an improper basis for recovery of damages, there is no basis upon which the Court can deduct an amount allocable to such service or services. For example, while there should be no recovery for legal fees incurred in the filing of the unfair labor practice charges, the Court could not determine how much of the $4,317.21 was improper. It should be noted, in this connection that in the Findings of Fact and Conclusions of Law, there is no breakdown showing the cost of each legal service allegedly rendered [Conclusion of Law 7, R. A. 69].

## VII.
## CONCLUSION.

Based on the foregoing, the Record on Appeal and matters of which this Court may take judicial notice, the judgment of the District Court should be reversed.

Respectfully submitted,

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## Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL CROST